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IN THE

Supreme Court of the United States

SUMITOMO CORPORATION OF AMERICA, SUMITOMO CORPORATION and SUMITOMO CORPORATION FUTURES, INC.,

Petitioners,

—v.—

OCEAN VIEW CAPITAL, INCORPORATED, formerly known as TRIANGLE WIRE & CABLE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals erred in creating an exception to the direct purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) to allow Ocean View to maintain overcharge claims for purchases it did not make from the defendants simply because the overcharge allegedly originated from a market manipulation.

Whether the court of appeals erred in concluding that Ocean View had antitrust standing under *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), despite the fact that permitting Ocean View to sue would entangle the trial court in a complex apportionment exercise to avoid duplicative recoveries, the relationship between prices in the allegedly manipulated market and the market where the alleged harm was suffered was not sufficiently direct and Ocean View's damages are speculative.

PARTIES TO THE PROCEEDING

Petitioners are Sumitomo Corporation of America, Sumitomo Corporation and Sumitomo Corporation Futures, Inc. Respondent is Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc. The other remaining defendants named in the amended complaint are Global Minerals and Metals Corporation, David Campbell, Credit Lyonnais Rouse and Yasuo Hamanaka.

RULE 29.6 DISCLOSURE

Sumitomo Corporation is the parent corporation of Sumitomo Corporation of America and Sumitomo Corporation Futures, Inc. Sumitomo Corporation owns 10% or more of Sumitomo Corporation of America's and Sumitomo Corporation Futures, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Sumitomo Corporation of America, Sumitomo Corporation and Sumitomo Corporation Futures, Inc. (collectively, "Sumitomo") hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court appeals is reported at 306 F.3d 469 (7th Cir. 2002), and is set forth in the Appendix ("App.") at App. 1a-52a. The order of the court of appeals denying the petitions for rehearing is dated January 30, 2003, and is set forth at App. 53a-54a. The opinion of the United States District Court for the Western District of Wisconsin granting the motion for summary judgment is reported at 153 F. Supp.2d 996 (W.D. Wis. 2001), and is set forth at App. 55a- 89a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 20, 2002, and denied the petitions for rehearing on January 30, 2003. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides, in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. The District Court Litigation

This case arises out of a rogue copper trading scheme by a former employee of Sumitomo, which allegedly included an attempt to manipulate copper prices on the London Metals Exchange (the "LME"). As a result of this scheme, Sumitomo suffered $2.6 billion in trading losses. Sumitomo also entered into a settlement with the Commodity Futures Trading Commission (the "CFTC") whereby Sumitomo paid $150 million to the CFTC, including a civil monetary penalty of $125 million and $25 million for private claimants. *In re Sumitomo Corp.*, CFTC Docket No. 98-14, 1998 WL 236520 at *8-9 (May 11, 1998) (the "CFTC Order"). Sumitomo has also been sued in numerous private actions, including cases brought by a plaintiff who traded on the LME and by a group of traders on the Commodities Exchange Division of the New York Mercantile Exchange ("Comex"). The rogue trader is now in prison in Japan.

Ocean View, a purchaser of copper in the cash market, originally sued Sumitomo and others in the District Court for the Southern District of New York.[1] Ocean View's claims are not premised on purchases from Sumitomo (or any other defendant), and Ocean View did not trade on any exchange. Rather, Ocean View alleges it

[1] Jurisdiction was based on 28 U.S.C. §§ 1331 and 1337, as well as principles of supplemental jurisdiction under 28 U.S.C. § 1367(a).

was damaged because of a three-step chain of causation whereby a manipulation of futures prices on the LME affected futures prices on Comex, which in turn affected the prices Ocean View paid for copper rod, because those purchases were set by reference to prices on Comex.[2]

Copper rod, the primary form of copper purchased by Ocean View, is fabricated from copper cathode. During the relevant period, most cathode in the United States was refined through a three-step process. First, copper ore was removed from a mine and crushed into copper concentrate. Second, concentrate (and scrap copper) was smelted into anode or blister. Third, anode and blister were refined into cathode. Copper rod was then fabricated from copper cathode. All forms of physical copper are bought and sold at prices set by reference to the price of copper futures on Comex and/or the LME.

Ocean View's amended complaint does not allege any manipulative activity on Comex. Instead, it relies primarily on the CFTC Order, which also contains no allegation of wrongdoing on Comex. Rather, the CFTC found that Sumitomo's copper trader manipulated prices on the LME by hoarding LME copper warrants, taking large positions in LME copper futures, and entering into unnecessary supply contracts at prices indexed to LME prices. CFTC Order at *4-5. The CFTC further found that Comex prices were inflated because of arbitrage between the two exchanges and because high prices on the LME drew physical copper from Comex warehouses to LME warehouses. *Id.*, at *5.

Ocean View filed this action in the Southern District of New York. On January 29, 1999, defendants moved to

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[2] Ocean View made certain *de minimis* purchases from Sumitomo Corporation of America, but these purchases are not the predicate for its claims. App. 73a and 87a-88a.

dismiss. On December 15, 1999, the New York court granted the motion, finding that Ocean View's alleged harm was only indirectly related to the alleged misconduct and its alleged damages were too speculative. *Ocean View Capital, Inc. v. Sumitomo Corp. of America*, 1999 U.S. Dist. LEXIS 19194 (S.D.N.Y. Dec. 15, 1999). Before the dismissal order was entered, however, the Judicial Panel on Multidistrict Litigation consolidated the *Ocean View* action with another case that had been filed in the Western District of Wisconsin, and transferred the *Ocean View* action to that court, which vacated the New York court's decision and denied Sumitomo's renewed motion to dismiss. *Ocean View Capital, Inc. v. Sumitomo Corp. of America*, 98 F. Supp.2d 1039 (W.D. Wis. 2000).

The parties then conducted discovery on the issue of antitrust standing, and Sumitomo moved for summary judgment on the grounds that Ocean View lacked standing under this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). Faced with the obvious problem that it was not a direct purchaser under *Illinois Brick*, Ocean View argued that so long at it was the "first purchaser" of copper cathode (or rod) whose price had been inflated as a result of Sumitomo's conduct, it could recover for purchases from non-defendants.

The district court rejected Ocean View's attempt to evade the clear mandate of *Illinois Brick*. It held that "there is no support in the case law for plaintiff's theory of the first purchaser as the equivalent of the direct purchaser under *Illinois Brick*." App. 81a. It rejected Ocean View's attempt to "adapt its claim to the concept of 'umbrella standing' relied upon in *Sanner v. Board of*

Trade, 62 F.3d 918 (7th Cir. 1995)." *Id.* And it found that Ocean View's attempt to circumvent the direct purchaser rule would require a complex exercise to determine how much of the alleged overcharge was passed on as copper moves along the chain of production and distribution, because all of these transactions are generally priced by reference to Comex. The court concluded that this was foreclosed by this Court's rulings in *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481 (1968), which held that a defendant may not seek to avoid (or minimize) liability for price-fixing by arguing that the plaintiff "passed on" the overcharge in its own sales of the product, and *Illinois Brick*, which held that the bar on a pass on defense must go hand-in-hand with limiting price-fixing suits to direct purchasers. App. 77a-78a.

B. The Court of Appeals' Decision

The court of appeals reversed. In so doing, it held that "*Illinois Brick* does not stand for the proposition . . . that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell . . ." App. 16a. Rather, the panel interpreted *Illinois Brick* to stand for the much narrower proposition that a plaintiff who purchases a product originally sold by the defendant to a middleman lacks standing to raise a claim. App. 17a ("[t]he reason the plaintiffs' suit in *Illinois Brick* failed was *not* because the defendants did not sell to them. Rather, it was because the defendants *did* sell to a third party . . . who could recover for any injury they claimed") (emphasis in original). Based on this narrow reading, the panel discarded *Illinois Brick's* direct purchaser rule in favor of the "first purchaser rule" advocated by Ocean View.

Having read the "direct" requirement out of *Illinois Brick's* direct purchaser test and replaced it with a

requirement that plaintiff be the "first purchaser" of the product that was the target of the alleged manipulation—in this case, cathode—the panel expanded its new test even further by permitting Ocean View to recover for its first purchases of copper rod, even though rod was not the target of the alleged manipulation. As the panel acknowledged, "the physical market transaction at the heart of the defendants' scheme [was] the purchase of cathode." App. 33a and 43a-44a. And, unlike cathode, rod is not traded on the LME or Comex. Rather, rod is manufactured from cathode by both producers of cathode and semi-fabricators.

The panel further concluded that, at the summary judgment stage, Ocean View met the standing requirements of *AGC*. Thus, despite the fact that (a) Ocean View's alleged injury was felt in a market (the cash market) two steps removed from the market in which Sumitomo's manipulative trading activity took place (the LME), (b) there was no evidence of manipulative conduct on Comex and (c) LME prices diverge from Comex prices for days, week or even months at a time, the panel concluded that Ocean View's injury was sufficiently direct under *AGC*. And, even though Sumitomo allegedly devised the scheme to profit from its *own* cash market sales (App. 8a), the panel concluded that Ocean View—which did not buy cathode from Sumitomo—was the best situated plaintiff to maintain this action. Finally, the panel concluded that evidence that Ocean View's claim would duplicate the claims of parties in the futures market did not bar suit. Rather, it directed the district court and the parties to engage in a six year, trade-by-trade analysis to determine the extent of duplication, after which damages would be apportioned (by reducing Ocean View's claim) to eliminate that duplication.

REASONS FOR GRANTING THE PETITION

In *Illinois Brick*, this Court established a hard and fast rule of antitrust standing for price-fixing cases: the ***only*** persons who can sue are those who purchase the allegedly overpriced product from the defendant. In *Illinois Brick* and again in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), this Court made clear that the "direct purchaser" rule is to be strictly applied. Courts are not to make case-by-case determinations of whether the policies underlying *Illinois Brick* apply in a given situation. Yet this is precisely what the panel did here. Motivated by its desire not to allow an alleged scheme that was "*so* evil . . . and caused *so* much economic loss throughout the cash market" to go unpunished ((App. 40a) (emphasis in original)), it created an exception to *Illinois Brick* for cases where the overcharge results from an alleged market manipulation. In so doing, the panel adopted the doctrine of "umbrella standing," which two other circuit courts, adhering to the clear mandate of *Illinois Brick*, have rejected. The petition should be granted to correct this error, resolve the conflict and make clear—again—that this Court meant what it said in *Illinois Brick* and *Utilicorp*.

The panel also so fundamentally misinterpreted the *AGC* standing test as to turn market manipulation cases into complex exercises in apportioning overcharges suffered by persons in different markets and/or at different levels of a chain of distribution. The petition should be granted to make clear that, as this Court has previously stated, this line of inquiry is off-limits.

The panel's decision creates a rule of law that a party who manipulates a commodities futures market is liable for every purchase and sale of that commodity in the physical market. The panel's decision will transform the

treble damages sanction from a tool for enforcement into a tool of destruction in market manipulation cases. Indeed, Sumitomo has already paid hundreds of millions of dollars to settle claims brought by futures market traders and by indirect purchasers under state laws permitting such claims. It was also subject to suit by direct purchasers. The panel's desire not to grant Sumitomo a "pass under the antitrust laws" (App. 40a), and the manner in which it ignored this Court's mandate in order to punish Sumitomo, was unwarranted as a matter of law and unnecessary as a matter of fact.

A. The Panel's Decision Conflicts with *Illinois Brick*

In *Illinois Brick*, plaintiffs sued manufacturers and distributors of concrete block for alleged overcharges in the price of that block. The plaintiffs, however, had not purchased the block from the defendants. Instead, they alleged the blocks had been sold to subcontractors and used in buildings that were sold to plaintiffs. This Court rejected plaintiff's claim, and held that a purchaser seeking to recover an overcharge may not maintain an antitrust claim against a defendant from whom it did not purchase the allegedly overpriced product. *Illinois Brick*, 431 U.S. at 728-729. This Court recognized that its ruling might bar recovery by persons injured by an antitrust conspiracy, but identified two overriding policy concerns that precluded plaintiffs from using the antitrust laws to recover for such injury.

First, the Court reasoned that allowing indirect as well as direct purchasers to recover damages "would create a serious risk of multiple liability for defendants." *Illinois Brick*, 431 U.S. at 730. As the Court later explained, its decision in *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising

from a single transaction that violated the antitrust laws." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474-75 (1982).

Second, the Court was concerned that permitting plaintiffs at multiple levels of a distribution chain to sue for alleged overcharges resulting from the same wrongdoing would burden the courts with the enormously complex task of attempting to apportion damages among parties at each level of distribution, thereby undermining effective enforcement of the antitrust laws. *Illinois Brick*, 431 U.S. at 735, 740-42. Permitting indirect purchaser claims:

> would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id., at 737. *See also Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 208 (1990) (direct purchaser rule "serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.")

This Court has made clear that the direct purchaser rule is to be strictly enforced and has rejected efforts to create exceptions to *Illinois Brick*:

> [E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in

> *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

Utilicorp, 497 U.S. at 216-217. In *Utilicorp*, natural gas producers and a pipeline company allegedly conspired to artificially inflate the price of natural gas sold to public utilities, which passed the entire overcharge on to residential customers by means of various rate-making regulations. The plaintiffs argued that consumers should be given standing because, in the context of regulated public utilities that pass on 100 percent of their costs, the policies underlying *Illinois Brick* did not apply. *Utilicorp*, 497 U.S. at 207-208. They also claimed they could prove the "exact injury" to consumers because the defendants made public filings showing the volume and price of the gas they sold. *Id.*, at 208.

This Court refused to adopt an exception to *Illinois Brick*, even though the consumers had clearly been injured by the conspiracy. It noted that its decisions in *Illinois Brick* and *Hanover Shoe* "often deny relief to consumers who have paid inflated prices because of their status as indirect purchasers." *Id.*, at 211-212. Recognizing the rationale of those cases "will not apply with equal force in all cases," this Court concluded that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.*, at 216.

The panel ignored this clear mandate. It created a new rule, under which cases involving alleged market manipulations that impact the prices of commodities which are bought and sold along a chain of distribution are exempt from the direct purchaser rule. Nothing in *Illinois Brick* supports this exception. In fact, it flies in the face of *Utilicorp's* instruction that application of the direct purchaser rule is ***not*** subject to a case-by-case analysis of the economics of the allegedly manipulated market.

The panel's decision is a textbook illustration of the danger of creating exceptions to *Illinois Brick*. By venturing down the slippery slope of crafting an exception to the direct purchaser rule, the panel opened the door to complex questions of apportionment which *Illinois Brick* avoids. The panel fell into this quagmire by failing to recognize—and respect—the interrelationship between *Illinois Brick* and another of this Court's seminal cases on the subject of antitrust standing, *Hanover Shoe*.

In *Hanover Shoe*, a manufacturer of shoe-making equipment was sued by a shoe manufacturer, who alleged that it had to pay more for the equipment as a result of the defendant's policy of leasing (but refusing to sell) the equipment. The defendant sought to reduce its liability by demonstrating that the plaintiff passed on any increased costs by raising the price of the shoes it sold. The Court rejected this argument because it did not want to entangle the courts in complex issues regarding the amount of the pass on.

Illinois Brick presented the flip side of *Hanover Shoe*—whether persons who did not purchase from the defendant could sue on the theory that the overcharge had been passed on to them by previous purchasers. This Court made clear that these issues are inextricably intertwined. If only persons who purchase from the defendant can sue to recover for an unlawful overcharge, the issue of whether the purchaser passed on the overcharge may not be raised. If, however, persons who purchase from someone other than the defendant can sue—as the panel permitted Ocean View to do—then the defendant may argue that the plaintiff passed all or part of the overcharge on to a subsequent purchaser. "[W]hatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants." *Illinois Brick*, 431 U.S. at 728. This Court chose

to adhere to its ruling in *Hanover Shoe*, holding that only direct purchasers may sue, and defendants may not argue that the plaintiff passed on any overcharge it paid to its customers.

The undisputed evidence here was that Comex—the index used for Ocean View's purchases—was the "overriding factor that affected the market price of [Ocean View's] end products on a day-to-day basis." App. 73a. Ocean View—with varying degrees of success—passed on increases in the cost of the copper it purchased to its customers. D.E. 316 (Defendants' Proposed Findings of Fact ("DPFF") ¶¶ 145-146). Indeed, in some years its gross profits actually *increased* as a result of the increase in copper prices allegedly engineered by Sumitomo. *Id.*

By abandoning *Illinois Brick*, the panel necessarily removed the *Hanover Shoe* bar on the introduction of evidence of pass on. On remand, the district court will have to analyze Ocean View's sales of copper products to determine the extent to which Ocean View passed on any overcharges. The panel thus opened the door to precisely the analysis that *Illinois Brick* and *Hanover Shoe* foreclose. *Utilicorp* warns against creating exceptions to *Illinois Brick*, because "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Utilicorp*, 497 U.S. at 216. The panel's failure to heed this warning must be corrected.

The panel's decision illustrates another danger posed by creating exceptions to *Illinois Brick*. Having opened the door to the "first purchaser" exception based on its review of the record in a related case before it (*Viacom Incorporated v. Global Minerals*, No. 01-3485), where the plaintiffs purchased cathode, the panel recognized the door was not sufficiently ajar to permit Ocean View to proceed. Ocean View did not purchase cathode, the

commodity that was the subject of the alleged market manipulation. Ocean View purchased copper rod, a product that is made from cathode and which contains an additional element in its pricing formula (the "rod premium") not present in the price of cathode. Copper rod is ***not*** traded on the LME, ***not*** traded on Comex and was ***not*** the target of Sumitomo's alleged misconduct. Indeed, the panel acknowledged that "the physical market transaction at the heart of the defendants' scheme [was] the purchase of cathode." App. 33a.

Undeterred, the panel opened the door even wider and permitted Ocean View to proceed on the theory that rod is basically the same as cathode, and that rod, like cathode, is priced by reference to Comex. App. 43a-44a.[3] Under the panel's logic, purchasers of copper anode—from which cathode is made and which is also priced by reference to Comex—should also be able to sue for any overcharges resulting from Sumitomo's misconduct. Yet the panel held that purchasers of anode would not have standing, in part because anode was not the form of copper that was the target of the manipulation.[4] But neither

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[3] The panel supported its finding that it is sufficient to purchase a product (rod) made from the allegedly manipulated product (cathode) by citing *In re Sugar Industry Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978). There, the Third Circuit held that where plaintiff purchased candy containing sugar and alleged that the price of sugar had been manipulated, *Illinois Brick* did not bar suit. The court, however, made clear that standing was limited to purchases of candy *from* the defendant, and specifically noted that "in the face of *Illinois Brick*, plaintiff has no hope of success on the purchases from nondefendants." *Id.*, at 16. Thus, *In re Sugar* actually supports Sumitomo's position—standing is limited to those who purchase the allegedly manipulated product (or another item made from that product) from a defendant, *not* a third party.

[4] Anode is between 98 and 99 percent pure copper. Cathode and rod are more than 99 percent pure copper. D.E. 316 (¶¶25-27).

was rod. Having abandoned the certainty of *Illinois Brick* and *Utilicorp*, the panel found itself playing fast and loose with its own exception, drawing artificial distinctions among "first purchasers" of various copper products in order to mold its exception to the facts of Ocean View's purchases. This entire exercise demonstrates the soundness of the no exceptions policy articulated in *Illinois Brick*, and reiterated in *Utilicorp*.

In the face of *Illinois Brick's* bar on suits by persons who did not purchase from the defendants, the panel allowed Ocean View to seek damages arising from hundreds of millions of dollars of purchases of copper from companies which are not defendants in this action. This ruling is flatly inconsistent with this Court's direction that only the "immediate buyers from the alleged antitrust violators" may sue for damages. *Utilicorp*, 497 U.S. at 207. And it opens the door to a complex analysis of Ocean View's Comex-referenced sales, in violation of *Hanover Shoe*. The petition should be granted to review this drastic departure from this Court's precedent on the subject of antitrust standing.

B. The Panel's Decision Conflicts With Decisions of the Third and Ninth Circuits Rejecting "Umbrella Standing"

In fashioning its exception to the direct purchaser rule, the panel reasoned that market manipulation cases are different, and that Sumitomo was not on the top of any distribution chain akin to that present *Illinois Brick*. The panel thus adopted the doctrine of "umbrella standing," under which persons who do not purchase from the defendants may sue to recover for overcharges generated under the "umbrella" of the manipulator's misconduct. The panel observed that "the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other." App. 17a. But the

cases it cited were *not* price-fixing cases. Rather, they involved refusals to deal and other exclusionary practices. *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (exclusion and boycott of class of health care services from eligibility for reimbursement under insurance plan) and *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (competitor's refusal to deal).

In price-fixing and price manipulation cases, however, courts—including the courts of appeal for the Third and Ninth Circuits—have followed *Illinois Brick's* mandate and barred claims by persons who did not buy from a defendant, regardless of whether the product originated with the defendant. These courts have flatly rejected the concept of "umbrella standing." *See, e.g., Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1340-41 (9th Cir. 1982).

The courts that have rejected umbrella standing have been concerned, in part, that a contrary ruling would result in an unreasonable expansion of liability. As the Third Circuit cautioned, "the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws." *Mid-West Paper*, 596 F.2d at 586-587. Here, the panel adopted a rule of standing that would hold Sumitomo liable to *anyone* who purchased cathode or rod from *any* seller of cathode or rod between 1990 and 1996. This would be in addition to Sumitomo's potential liability to all LME and Comex futures traders during the same period, as well as potential liability under *Illinois Brick* to physical market participants who purchased directly from Sumitomo. To state this result is to demonstrate the error of the panel's decision.

The panel's abandonment of *Illinois Brick* and its adoption of umbrella standing appear to have been prompted by its belief that the defendants' position was that because the alleged manipulation took place on a futures market, no one in the physical market could sue. App. 20a-21a. As a matter of law, the panel's reasoning was seriously flawed. *Illinois Brick* does not give the lower courts license to grant standing whenever they perceive the need to punish a defendant. The *only* relevant inquiry is whether the plaintiff is a direct purchaser. In any event, the panel's premise was simply erroneous. Ocean View alleged that Sumitomo intended to profit from its alleged manipulation by selling cathode in the physical market. Thus, as Sumitomo argued below, and the district court correctly found, there are participants in the physical market—those who purchased copper from Sumitomo—who were direct purchasers and would therefore be entitled to bring a claim under *Illinois Brick*. App. 87a.

In permitting Ocean View to sue a defendant from whom it did not purchase the product for which it seeks recovery, the panel effectively adopted the doctrine of umbrella standing. Its holding creates a conflict with rulings of the Third and Ninth Circuits, both of which have rejected such an exception to *Illinois Brick*. The petition should be granted to resolve this conflict.

C. The Panel Misinterpreted The *AGC* Standing Test

In *AGC*, this Court held that in determining whether an alleged antitrust injury is sufficiently direct to confer antitrust standing, a court should consider: (1) the causal connection the violation and the harm; (2) the presence of improper motive (*i.e.*, intent); (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicative recovery or

complex damages apportionment. *AGC*, 459 U.S. at 536-545. The panel misinterpreted this test in a manner that, if left unaddressed, opens the door to speculative claims and complex questions of apportionment of damages that *AGC* intended to foreclose.

First, and most fundamentally, the panel misinterpreted the sixth *AGC* factor, *i.e.*, the risk of duplicative recovery or complex damages apportionment. The record demonstrates that, to varying degrees and in varying ways, the suppliers who sold physical copper to Ocean View managed (or "hedged") the price risk associated with their physical operations by, among other things, purchasing Comex futures or options. The evidence submitted by Sumitomo was that such hedging created a risk of duplicative liability with respect to those suppliers' physical market sales. Based on this undisputed record, the district court found that, assuming Ocean View's allegation that Sumitomo was manipulating the futures markets was true:

> the market price at which a supplier hedged its future sales of copper would have been an artificial one that caused the supplier injury long before it shipped copper to plaintiff. To the extent that the supplier passed on the artificial price, plaintiff's damages would be duplicative of its supplier's, who could assert its own claim for overcharges on the same copper.

App. 86a.

The panel erroneously reached the opposite conclusion here by reasoning that because purchases of physical copper could not be "matched" with specific futures trading on the exchanges, it would be impossible to determine the precise extent of the duplication. App. 35a-37a and 43a. It then directed that on remand, the district court "explore further whether these hedging

transactions would lead to some degree of duplicate recovery and a corresponding need to reduce damages." App. 36a. In effect, the panel held that the complex relationship between futures trading and physical market sales precluded Sumitomo from establishing that any recovery by Ocean View would duplicate the damages to a particular futures trader.

By requiring defendants to prove that Ocean View's claimed damages would duplicate the recovery of a specific futures trader, the panel turned the *AGC* standing inquiry on its head. Standing is plaintiff's burden, not defendants'. *See* Philip E. Areeda & Herbert Hovenkamp, II *Antitrust Law* 360 (Rev. Ed. 1995). The inordinate complexity of the damages calculation is a reason to deny standing, not to grant it. *Illinois Brick*, 431 U.S. at 730-731. Thus, the only conclusion to draw from the record was not that Sumitomo failed to prove a duplication of damages; rather, the panel should have concluded that Ocean View could not prove that its recovery will *not* duplicate damages allegedly suffered in the futures market in connection with the hedging activities of Ocean View's suppliers. The panel's invitation to the district court and Sumitomo to engage in a trade-by-trade analysis of Ocean View's purchases and the hedging activities and daily futures positions of Ocean View's suppliers over a six year period is precisely the type of complex exercise that the *AGC* test seeks to avoid.

Second, the panel erroneously concluded that Ocean View's injury was sufficiently direct. It based this finding on its belief, formed in connection with a related appeal, that "Sumitomo purchased futures on Comex to drive up the price on that particular exchange artificially, and the prices Viacom paid for copper were directly based on Comex prices." App. 27a. There was no evi-

dence that Sumitomo's allegedly manipulative activities took place on Comex, and the panel cited none. Indeed, Ocean View never made any such allegation—its complaint referred to manipulation on the LME, and alleged that the LME and Comex move in lockstep. D.E. 318 (Ex. 1). But the undisputed evidence in the record was that LME and Comex prices often diverge significantly. D.E. 321 (¶71) and D.E. 316 (at DPFF ¶137). Thus, the requisite direct linkage between Sumitomo's alleged manipulation of the LME and Ocean View's physical market purchases at prices linked to various Comex-referenced formulas was lacking.

Moreover, the panel erroneously applied its review of the record in the *Viacom* appeal to the facts in *Ocean View*. Thus, the panel found that because Viacom's purchases were all based on one Comex reference price (the month average) plus a cathode premium, the Comex futures prices and the price Viacom paid for cathode moved in lockstep. App. 28a-29a. It therefore rejected evidence that Comex quotes numerous exchange prices at any given time and that Sumitomo's actions could have affected those prices differently as irrelevant to Viacom's purchase patterns. Yet the court recognized that if a purchaser used multiple Comex-referenced pricing formulas, "perhaps they should be found to be improper plaintiffs under the antitrust laws, though it is an issue for another day." App. 29a-30a. The undisputed evidence was that Ocean View used four formulas, and that the use of those formulas varied over time. D.E. 316 (DPFF ¶49). Thus, Ocean View presented the "issue for another day," which the panel simply ignored.

Finally, the panel incorrectly concluded that Ocean View's injury was not speculative. In reaching this conclusion, it again ignored the evidence concerning Ocean View's business. That evidence demonstrated that Comex

—the index used for Ocean View's purchases—was the "overriding factor that affected the market price of [Ocean View's] end products on a day-to-day basis." App. 73a. It also demonstrated that Ocean View passed on to its customers all or part of any increases in the cost of the copper it purchased. D.E. 316 (DPFF ¶¶ 145-146). For example, Ocean View admits that virtually all of the $12 million increase in gross profits in 1994 was attributable to higher copper costs—*i.e.*, higher Comex prices. *Id.*

Presented with similar evidence of purchases and sales made with reference to Comex in connection with the appeal of another of the related cases decided by the district court,[5] the panel found that because the plaintiffs in those cases (the "Scrap Dealers") bought and sold physical copper at Comex related prices:

> it is difficult to know whether they suffered any economic loss at all as a result of the defendants' actions . . . [T]he Scrap dealers . . . are alleging that the defendants' market manipulations caused the price of copper to increase steadily from 1994 to 1996. Therefore, on most or all of the sales the Scrap Dealers made in that time frame, which they contend are inflexibly linked to prevailing Comex prices, they should have made a slight profit because of Sumitomo's actions. . . . In short, the exact nature of the damages they have suffered is speculative.

App. 24a. *See also* App. 26a ("Yet the evidence shows that Sumitomo's actions caused the Comex price to rise throughout the period at issue in this case, making us

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[5] *Loeb Industries, Inc. v. Sumitomo Corporation* (No. 00-3979) and *Loeb Industries, Inc. v. JPMorgan Chase* (No. 01-1148). The panel consolidated the *Loeb*, *Viacom* and *Ocean View* appeals for purposes of issuing its opinion.

skeptical that the Scrap Dealers have suffered any real loss at all.")

The panel's reasoning with respect to the Scrap Dealers in *Loeb* applies with equal force to Ocean View. Ocean View purchased at prices referenced to Comex. It sold at prices referenced to Comex. When prices went up, its gross profits went up. The panel should therefore have been equally "skeptical" that Ocean View suffered any real loss at all, and should also have concluded that the "exact nature" of the damages Ocean View suffered is "speculative."

In creating the rules of standing reflected in *Illinois Brick* and *AGC*, this Court recognized that there might be cases in which parties injured as a result of an antitrust conspiracy would be unable to recover damages. *See, e.g., Illinois Brick,* 431 U.S. at 746. But it concluded that there were very important policy considerations, including the need to avoid converting antitrust actions into complex exercises in apportioning damages among purchasers at various levels in a market, which necessitated this result. The panel's rewriting of *Illinois Brick* and *AGC* threatens to open the door to the types of claims that *Illinois Brick* and *AGC* intended to foreclose. The petition should be granted to correct these mistakes.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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